

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 1999-339-E - ORDER NO. 1999-888  
DECEMBER 20, 1999

IN RE: Duke Power Company, A Division of Duke	)	ORDER RULING ✓
Energy Corporation,	)	ON MOTIONS
	)	
Complainant,	)	
	)	
vs.	)	
	)	
Cherokee County Cogeneration Partners,	)	
L.P.,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Public Service Commission of South Carolina on several Motions related to this complaint matter involving Duke Power (Duke) and Cherokee County Cogeneration Partners, L.P. (Cherokee). Duke has filed a two count complaint against Cherokee, alleging both breach of contract and misrepresentation. Cherokee has filed a Motion to Dismiss Complaint and Alternative Motion to Hold in Abeyance. Duke has filed a Motion to Withdraw its Complaint. For the reasons stated below, we grant Cherokee's Motion to Dismiss the breach of contract count, while denying Duke's Motion to Withdraw. However, we grant Duke's Motion to Withdraw the misrepresentation count without prejudice.

With regard to the breach of contract count, we have reviewed the case law, and have come to the conclusion that we have no jurisdiction to adjudicate this matter.

Duke Power complains that Cherokee breached the purchased power agreement (PPA) between the two companies, and alleges that the Commission has continuing jurisdiction over the PPA as a result of the authority delegated to it under the FERC's PURPA regulations. Duke alleges, as its remedy, that this Commission has the authority to terminate the PPA. The case law published in various Federal and State jurisdictions would indicate otherwise that this Commission has no continuing jurisdiction, nor does it have any authority to terminate the contract at this point.

In Crossroads Cogeneration Corp. v. Orange & Rockland, 159 F. 3d 129 (3d Cir. 1998), the Third Circuit Court of Appeals held that a breach of contract claim brought before the Federal District Court was not barred by either issue or claim preclusion because the New York Public Service Commission had properly limited its prior action on the dispute to an interpretation of its prior order, not an interpretation of the underlying contract. The Third Circuit noted that the New York Commission's action was necessarily so limited because that Commission had no jurisdiction to consider the breach of contract claims. The Court went on to state that once an agreement is approved by the state agency, the rights of the parties "are to be determined by applying normal principles of contract interpretation to their agreement." The Court stated, "Though FERC did allow state agencies to approve such agreements, the implementation authority of state agencies end once an agreement is approved."

Further, in Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners, 44 F.3d 1178 (3d Cir. 1995), the Court also held that the New Jersey Board of Regulatory Commissioners had no jurisdiction to modify the terms of a power purchase agreement between a public utility and a qualifying facility of the same type as

the PPA. Duke is seeking ultimate modification of the PPA as a remedy for breach of contract by asking the Commission to terminate the PPA. Under this authority, this Commission would have no jurisdiction to order the requested relief, nor even to decide whether Cherokee is in breach of the PPA.

Additional authority appears in Kamine/Besicorp Allegany L.P. v. Rochester Gas & Electric Corp., (W.D.N.W. 1995). In that case, a Federal District Court granted a temporary restraining order against a public utility that refused to accept deliveries of power pursuant to a QF agreement. The utility involved claimed that the QF, which had lost its thermal host and was in the process of adding a new one, no longer met the criteria for a QF and therefore the purchase power agreement could be terminated. The Court stated that state commissions could not modify the terms of previously approved contracts.

State authority is also explicit as to the question of continuing jurisdiction of a State Commission over a utility-QF contract. In Idaho Power Company v. Cogeneration Inc., 921 P. 2d 746 (Idaho 1996), the Idaho Supreme Court held that the State Commission lacked the authority to interpret the terms of a QF contract. In Smith Cogeneration Management, Inc. v. Corp. Commission and Public Service Co. of Oklahoma, 863 P. 2d 1227 (1993), the Oklahoma Supreme Court rejected a continuing jurisdiction claim on the grounds that FERC had implemented regulations under PURPA exempting QFs from utility-type regulation and exercising authority over the contract pricing terms. What Duke is seeking in the present case is utility-type regulation, since it is seeking Commission modification of the contract through termination of said contract.

The Texas Supreme Court has also considered the role of a State Commission once approval of a PPA has been completed. In PUC v. Office of Public Utility Counsel, 809 S.W. 201 (Tex. 1991), the Texas Supreme Court noted that the federal regulations implementing PURPA do not authorize the Commission to alter the terms of a purchased power contract between a utility and a QF.

Various State Commissions have also examined the issue. In Erie Energy Associates, 1992 N.Y. PUC LEXIS 52 (1992), the New York Commission explored the issue of whether a State Commission should decide disputes between the parties concerning the terms of a QF agreement. A QF sought a ruling from the Commission declaring that its QF contract was still in effect. The Commission denied the motion, noting that it lacked continuing jurisdiction over QF contracts. The Commission noted that its responsibility under PURPA was limited to “the supervision of the contract formation process.” The New York Commission noted various policy reasons for this decision, including the principle that “intervention in this sort of dispute would lead to frequent petitions requesting resolution of other contract controversies between utilities and suppliers of all sorts.” The Commission went on to conclude that “these are disputes between businesses, better resolved, according to commercial law principles through negotiation, arbitration, or the Courts.”

The Florida Public Utilities Commission dismissed a petition seeking a declaration of the proper interpretation of a negotiated QF contract. In Re: Florida Power Corporation, 1998 Fla. PUC LEXIS 2254 (1998), the Florida Commission stated that PURPA and FERC regulations carve out a limited role for the states in the regulation of the relationship between utilities and qualifying facilities. “States and their utility

commissions are directed to encourage Cogeneration, provide a means by which cogenerators can sell power to utilities under a state-controlled contract if they are unable to negotiate a power purchase agreement, encourage the negotiation process, and review and approve the terms of negotiated contracts for cost recovery from the utilities' ratepayers. That limited role does not encompass continuing control over the fruits of the negotiation process once it has been successful and the contracts have been approved."

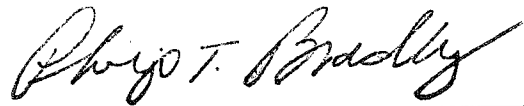
Finally, the California Public Utilities Commission in Re: Cogeneration and Small Power Prod. Dev. California PUC, Decision No. 92-02-014 (Feb. 5, 1992) dismissed efforts to modify the terms of a QF contract that was the subject of dispute between the parties. The California Commission stated the following: "In addition, a petition for modification is not the proper vehicle for resolving a contractual dispute between two parties. The dispute between these parties is properly the subject of civil litigation."

In summary, based on this law, we believe that we have no jurisdiction to hear contract disputes and/or breach of contract matters when considering an already-established contract between a utility and a QF. The authorities seem to be clear that our authority ends once the agreement is approved. Therefore, we have no authority to order the requested relief, nor to even decide whether Cherokee is in breach of contract. We believe these matters are better decided in another forum. The breach of contract portion of the Duke complaint is therefore dismissed for lack of jurisdiction. Accordingly, the Duke Motion to Withdraw is hereby denied as to the breach of contract portion of the Complaint.

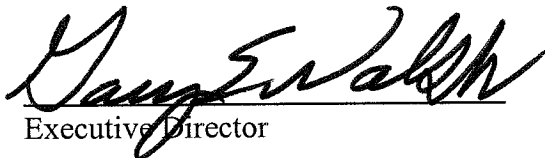
However, Duke's Motion to Withdraw the misrepresentation portion of its complaint without prejudice is granted. Duke states that it is uncontroverted that this Commission has jurisdiction to adjudicate the misrepresentation count of the Complaint. Although we take no position on this statement of the law, we do note that Cherokee at first vigorously opposed Duke's ability to withdraw the misrepresentation portion of its complaint. However, Cherokee no longer opposes this withdrawal, and, in fact, consents to the withdrawal. The withdrawal without prejudice of the misrepresentation count of Duke's complaint is therefore granted.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

  
Chairman

ATTEST:

  
Executive Director

(SEAL)